

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Detention of)	No. 61841-5-I
)	
)	
VICTOR KENNETH CANNON)	
)	
)	
STATE OF WASHINGTON,)	
)	
Respondent,)	
v.)	
)	
VICTOR KENNETH CANNON,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 27, 2009
)	

Ellington, J. — Generally, in order to preserve an evidentiary challenge for appellate review, a party must raise an objection in the trial court. Because Victor Cannon failed to make an appropriate objection below, we decline to consider his claims that the trial court violated the Frye¹ standard or ER 702 in admitting evidence that he suffered from paraphilia NOS (nonconsent) and antisocial personality disorder. We also conclude that Cannon has not demonstrated that defense counsel's failure to raise such objections below constituted ineffective assistance of counsel. We therefore affirm Cannon's commitment as a sexually violent predator under chapter 71.09 RCW.

¹ Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

FACTS

On July 13, 2006, based in part on Cannon's extensive history of violent sexual assaults against adults and children, including 1990 convictions for first degree rape, first degree child molestation and attempted second degree rape, the State filed a petition to commit Cannon as a sexually violent predator (SVP) under chapter 71.09 RCW.

At trial, Dr. Kathleen Longwell, the State's expert witness, testified that Cannon suffered from paraphilia not otherwise specified (NOS) nonconsent, antisocial personality disorder, pedophilia, and polysubstance dependence in institutional remission. Dr. Longwell also used three actuarial instruments to perform a risk assessment: the Static 99, the Minnesota Sex Offender Screening Tool-Revised, and the Sex Offender Risk Appraisal Guide. Cannon scored in the highest risk category in two of the three actuarial instruments. Based on additional assessment tools, Dr. Longwell found that Cannon had many high risk dynamic factors.

Dr. Longwell concluded that in combination, Cannon's mental abnormalities, including paraphilia NOS nonconsent and antisocial personality disorder, made it seriously difficult for him to control his sexually violent behavior and that he was more likely than not to commit another sexually violent offense if not confined.

Defense expert Theodore Donaldson disputed the validity of Dr. Longwell's diagnoses. He maintained that a valid paraphilia NOS nonconsent diagnosis could not be based on behavior alone and would require evidence of specific deviant arousal. Dr. Donaldson found no evidence that Cannon had a specific arousal to nonconsent.

Dr. Donaldson also maintained that antisocial personality disorder alone was insufficient to support an SVP commitment because it is merely a history of antisocial acts and does not cause a person to engage in any particular kind of behavior. He concluded that the evidence was insufficient to establish that Cannon met the SVP criteria.

The jury found that Cannon is an SVP, and the trial court ordered him committed.

DECISION

Cannon contends his civil commitment as an SVP must be reversed because the diagnosis of paraphilia NOS nonconsent is not generally recognized in the psychiatric field, and the diagnosis of antisocial personality disorder is overbroad and too imprecise to be helpful to the trier of fact.

Cannon contends that paraphilia NOS nonconsent is not recognized by the psychiatric profession and that the admission of Dr. Longwell's testimony therefore violated his due process rights. Under SVP commitment statutes, due process is satisfied "if a finding of dangerousness is linked to the existence of a mental abnormality or personality disorder that makes it seriously difficult for the person with the abnormality or disorder to control his or her behavior."²

We recently rejected an essentially identical argument in In re Detention of Post,³ noting that it constituted an improper attempt to sidestep a failure to challenge

² In re Det. of Post, 145 Wn. App. 728, 755, 187 P.3d 803 (2008) (citing Kansas v. Crane, 534 U.S. 407, 410, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)); see also In re Det. of Thorell, 149 Wn.2d 724, 761–62, 72 P.3d 708 (2003).

³ 145 Wn. App. 728, 187 P.3d 803 (2008).

the diagnosis by means of a Frye hearing in the trial court.⁴ Upon such a challenge, the trial court determines whether a scientific theory or principle “has achieved general acceptance in the relevant scientific community.”⁵ A party’s failure to raise a Frye challenge before the trial court generally precludes appellate review.⁶ Because Cannon did not raise the issue below, the State had no occasion to respond fully to the challenge he now makes. Accordingly, we decline to address the issue for the first time on appeal. Dr. Donaldson’s testimony challenging the validity of the paraphilia NOS nonconsent diagnosis therefore goes to the weight of the evidence, not its admissibility.⁷

Cannon raises a similar challenge to Dr. Longwell’s diagnosis of antisocial personality disorder. He argues that the diagnosis violates due process because it is too imprecise and broad to differentiate dangerous sexual offenders from the typical criminal recidivist, and that the evidence was therefore not helpful to the trier of fact under ER 702.⁸ But because Cannon did not challenge Dr. Longwell’s testimony on this basis below, he has waived the issue on appeal.⁹

⁴ Id. at 755.

⁵ In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993).

⁶ See Post, 145 Wn. App. at 755–56; see also In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

⁷ See Post, 145 Wn. App. at 757 n.19. The Post court also noted that numerous Washington courts have upheld SVP commitments based on a paraphilia NOS nonconsent diagnosis. Id. at 757 n.18.

⁸ Under ER 702, an expert witness may offer an opinion “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”

⁹ See Post, 145 Wn. App. at 756 n.16.

Cannon next contends that his counsel's failure to raise these issues below constituted ineffective assistance. To establish that he was denied effective assistance of counsel, a defendant must demonstrate both (1) that his attorney's representation fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.¹⁰

Washington courts have repeatedly upheld commitments based on paraphilia NOS nonconsent or antisocial personality disorder diagnoses under Frye or ER 702,¹¹ and Cannon has identified no SVP proceedings in which such evidence was excluded under Frye or ER 702. Cannon has therefore not overcome the strong presumption that counsel's apparent decision to forgo such challenges was not deficient.

Moreover, because Cannon did not raise the evidentiary challenges below, we can only speculate as to what foundation the State might have laid in response. Consequently, on this record, Cannon cannot demonstrate any reasonable likelihood that the trial court would have excluded testimony on paraphilia NOS nonconsent and antisocial personality disorder diagnoses under Frye or ER 702. Cannon thus cannot demonstrate prejudice.¹²

Finally, Cannon contends the State committed reversible error by eliciting testimony in violation of a pretrial ruling excluding evidence of the treatment available

¹⁰ State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

¹¹ See Post, 145 Wn. App. at 757 n.18; Young, 122 Wn.2d at 37–38; In re Det. of Sease, 149 Wn. App. 66, 201 P.3d 1078 (2009).

¹² See McFarland, 127 Wn.2d at 334–35.

at the Special Commitment Center (SCC). During cross-examination, in response to a question about why he had conducted multiple evaluations of certain SVPs in California, Dr. Donaldson contrasted the former laws in California with Washington, “where [SVPs are] committed once and then they have to prove they’ve changed in order to get out.”¹³ Over defense objections, the trial court permitted the deputy prosecutor to clarify, through additional questioning, that each SVP in Washington undergoes an annual review, including treatment records, to determine whether there has been progress in treatment. The trial court later denied Cannon’s motion for a mistrial.

The trial court has considerable discretion in regulating testimony when one party has “opened the door” to a subject area.¹⁴ As the trial court noted, Donaldson mischaracterized the Washington SVP procedure, suggesting that “this was potentially an indefinite commitment with the burden entirely on the respondent at some point in who knows what future to prove that they’ve changed.”¹⁵ Under the circumstances, the trial court did not abuse its discretion in permitting the deputy prosecutor to ask a few limited follow-up questions to clarify the erroneous testimony.

In Post, cited by Cannon, we reversed an SVP determination in part because of the erroneous admission of evidence detailing the SCC treatment program phases in which Post had not participated. We concluded that the evidence was highly prejudicial because it permitted the jury to base its verdict on the desirability of

¹³ Report of Proceedings (RP) (Apr. 23, 2008) at 1456.

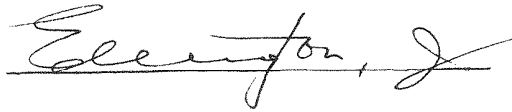
¹⁴ See Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003).

¹⁵ RP (Apr. 23, 2008) at 1499.

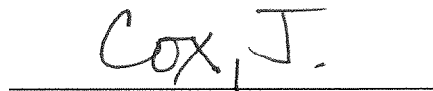
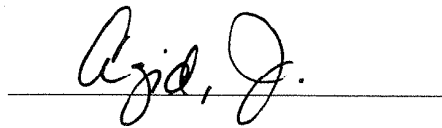
treatment phases that would be available only if Post were committed as an SVP.¹⁶

But unlike the extensive evidence in Post, the reference to SCC treatment here was brief and nonspecific. Nor has Cannon identified any attempt to draw irrelevant and unfairly prejudicial inferences from the reference to treatment. Under the circumstances, there was no reasonable possibility that the testimony diverted the jury from its obligation to determine whether Cannon was an SVP.¹⁷

Affirmed.

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WE CONCUR:

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¹⁶ See Post 145 Wn. App. at 747.

¹⁷ Because Cannon failed to preserve an evidentiary challenge to paraphilia NOS (nonconsent) and antisocial personality disorder diagnoses under Frye and ER 702, we do not address the State's challenge to "unpublished and extrarecord" articles referred to in Cannon's opening brief.